and distribute the assets, or to take over the trust for judicial administration and control, both results being contrary to the jurisprudence of the State of Mississippi, and such applicable statutes as establish rules of property. The apparent purpose of the court, is to effect or require a reorganization of the trustee cororation as if a petition for an arrangement had been filed and jurisdiction accepted.

The majority opinion manifests a purpose not to terminate the trust and destroy the power and authority of the trustee, but to have petitioners continue in control of the property as judicial trustees. This proposal found its first expression in the opinion of the court, and without petitioners having an opportunity to controvert the question of the power of the court arbitrarily to superimpose its supervision upon the powers of the trustees under trust instruments which granted unlimited powers to the petitioners to act without supervision or control, other than their own judgment. It leaves the way open for the court to require the surrender of the trust properties to the beneficiaries, while the trustees are expected to continue in the exercise of their trust powers, without giving petitioners a day in court on which they might be permitted to show that powers in trust are not recognized in such cases under the laws of Mississippi, and that the trust which both the District Court and the Circuit Court of Appeals intended to preserve, would be destroyed by merger.

JURISDICTIONAL STATEMENT

Jurisdiction to grant the Writ of Certiorari on this petition is conferred by Judicial Code Section 240, as amended February 13, 1925, 43 Stat. 938 (28 USC 347). See also the Acts of January 31, 1928, 45 Stat. 54, and April 26, 1928, 45 Stat. 466 (28 USC 861 a. and b.).

Respondent, Edward Ball, is a resident of the State of Florida, and filed his complaint in the Southern District of Mississippi, the District in which all of the petitioners except F. N. Billingsly reside, the latter having his residence in the Eastern District of Louisiana. (R. p. 15 et seq.). The amount in controversy is in excess of $3000. (R. p. 16, par. 3; R. p. 134, par. 3; Dissenting Opinion of Judge McCord, R. p. 653).

Judgment was entered in the District Court on May 1, 1940, (R. p. 621). Motion for a New Trial was filed May 10, 1940, (R. p. 621), and overruled May 22, 1940, (R. p. 625). Notices of appeal were filed August 13 and 22, 1940, (R. p. 627), and bond for appeal was filed August 13, 1940, (R. p. 628). Within forty days after the filing of the Notice of Appeal, or after August 13, 1940, the District Court, on application duly made, extended the time for filing the transcript to ninety days from said date, (R. p. 637), and the record was duly certified to the Circuit Court of Appeals by the Clerk of the District Court on November 4, 1940, (R. p. 641), and was filed in the Circuit Court of Appeals.

The Appeal was heard by the Circuit Court of Appeals on April 29, 1941, (R. p. 642) and the court rendered its opinion on June 9, 1941, (R. p. 643 et seq.) and entered its judgment of even date, reversing the cause and remanding it to the District Court for further and not inconsistent proceedings (R. p. 659). On June 17, 1941, a motion was made by petitioners for further time to file a petition for a rehearing (R. p. 660), which was granted with an extension for thirty days on June 17, 1941 (R. p. 662). Petition for Rehearing was filed by petitioners on July 19, 1941, (R. p. 663), and was overruled on August 7, 1941 (R. p. 666). On motion therefor (R. p. 667), a stay of mandate was granted

on August 29, 1941 (R. p. 668), said stay allowing petitioners thirty days from the date thereof to file this petition to this Honorable Court.

QUESTIONS PRESENTED

1. Whether or not the incorporation of Trustee Corporation by petitioners was a reorganization, within the meaning of the declaration of trust, which required the stock and debentures of the corporation to be distributed as soon as the obligations of the Committee were paid, it appearing of record:

   a. That the Trustee Corporation was incorporated by the petitioners as a holding and operating corporation and as an instrumentality of the Committee in administering the trust in pursuance of the express power so to do granted by Paragraph 7 of the Bondholders' Protective Agreement. (R. 63).

   b. That the reorganization referred to in the declaration of trust and in the Bondholders' Protective Agreement had reference to a reorganization of the Gulfport Hotel Corporation and not to the incorporation of a new company as an instrumentality of the Committee.

   c. That the incorporation of the Trustee Corporation by the petitioners was not a reorganization in that it did not involve the adoption or approval of a plan and agreement of reorganization under which the property in the hands of

the Committee should be disposed of in any manner therein provided as required by the Bondholders' Protective Agreement.

d. That the incorporation of the Trustee Corporation did not effect a readjustment of the assets and liabilities so that the Trustee Corporation could operate as a going concern without the concert of action and exclusive control of the individual petitioners herein, and did not exhaust their powers, or amount to a performance of all their duties and obligations under the agreements.

2. Whether or not, upon the incorporation of the Trustee Corporation and the conveyance of the property to it the payment of debts incurred by the petitioners, the Bondholders' Protective Agreement, was satisfied and became *functus officio* as to the Trustee Corporation bonds and securities, and did not apply to or protect the holders of the stocks or securities of the Trustee Corporation, where such a result would be contrary to the express terms of the Bondholders' Protective Agreement.

3. Whether or not the petitioners had gravely abused their discretion in undertaking to issue ten-year refunding debentures in accordance with their powers under the agreements and the option to refund contained in the mortgage.

4. Whether or not the issuance of the refunding debentures was an abuse of discretion by petitioners, and whether or not the legal effect of the issuance of the

refunding debentures was to extend the control of petitioners over the trust properties for another ten years, or merely to prevent a foreclosure sale of the trust properties pending the further efforts of the petitioners to sell the same for distribution of the proceeds; it appearing that they had made repeated attempts to sell the same consistent with their duties as trustees, no other motive or intention being ascribed to them, and their power to issue the refunding debentures being expressly conferred upon them by the original debentures and the mortgage securing them.

5. Whether or not the court may enjoin the exercise of a power given in trust, contrary to the terms of the trust agreement.

6. Whether or not under Federal practice the court can take action to destroy a trust under state law, but continue the trustees in control under the theory of *powers in trust;* such trusts not being recognized under the laws of the state in which the property is situated and in which the court sits.

7. Whether or not a Federal Court can take over and administer a trust in property in the state where the court is held, where the state courts have no such power, under their own laws and jurisprudence governing trusts.

8. Whether or not state laws and decisions determine when there has been such misconduct of trustees as will enable a Federal Court to terminate or administer the trust.

9. Where neither party has asked or contended for a judicial administration of a trust, may an appellate court authorize the same on remand without giving the parties an opportunity to be heard thereon?

10. Where trustees hold under a trust agreement designed to prevent the necessity of judicial proceedings, and the trustees proceed with the exercise of the duties imposed; may an appellate court direct and authorize judicial supervision and ultimate dissolution thereof, contrary to the terms of the agreement, and if so, under what circumstances?

    a. Should it do so because the trustees refuse to surrender control to a purchaser of the majority interests?

    b. Should it do so because majority interests request judicial intervention?

    c. Should it do so because the trust-management has been successful to the extent of increasing the value of the trust property from a mere nominal value to fifty percent, or more, of its par on original value, and placing its operating corporation in such position that it might be sold as a going concern?

11. Where abuse of discretion is not one of the grounds for the dissolution of a trust under the laws of the state where the property is located and where the court is held, but merely renders the trustees accountable; may a Federal Court disregard the state rule; and may an appellate court fix the law of the case by its judgment directing the trial court to take such steps as would be in violation of the state rule?

12. If abuse of discretion is grounds for dissolution or judicial administration of a trust, is a finding of abuse *vel non* a finding of fact, or conclusion of law—or—

    a. When is it a finding of fact?

    b. When is it a conclusion of law?

    c. When may the parties stipulate whether or not abuse of discretion will terminate a trust?

    d. When will a conveyance in absolute trust, without limitation as to discretion be enforced according to its terms?

13. Where findings of fact and conclusions of law are not separately stated in writing by the District Judge, and on appeal no action is taken to require a full and complete compliance with Rule 52 of the Rules of Civil Procedure, there being a written opinion by the District Judge incorporated in the Record—

    a. Does the appellate court proceed anew to find the facts for itself, as in admiralty cases?

    b. Is the court privileged to adopt such findings as it pleases, and reject others without regard to the opportunities of the trial court and to the rule that findings must be accepted unless clearly erroneous?

    c. Is the true rule that in such cases the appellate court finds the opinion to be a substantial compliance under the harmless error rule, and binds itself to treat as fact that which is fact, and as law that which is law?

14. Will the petitioners in this case have been afforded due process of law; the mandate authorizing the District Court to proceed on a theory not presented by the record in the court below, not contended for by the parties, and on which they have had no reason to suppose the appeal would turn, the principles established being contrary to the decisions of the state establishing rules of property well known to the attorneys in the case and concerning which there was no controversy?

15. Does not due process of law require an appellate court to submit any question which it finds to be determinative of the case, but which was not raised by the parties, to a further consideration by the litigants and a further hearing on such question before it rules thereon and makes its rule the law of the case?

16. Where a trust agreement is so drawn as to repose absolute and unlimited control in the trustees and to the exclusion of the courts, and a third party buys shares of the beneficial interests to the extent that he can control the property on a dissolution of the trust, and brings actions which harass the trustees and hinder their administration; to what extent will the process of this Honorable Court be available to discontinue a judicial interference and administration which was not contemplated by the original parties to the trust agreement, not within the terms, and which would not be permitted by ~~its~~ the courts of the state in which the trust property is located.

REASONS FOR ALLOWANCE OF WRIT

I.

The Circuit Court has decided an important question of local law in a way which is probably in conflict with applicable local decisions. It has assumed that an abuse of discretion authorizes the termination of a trust, and that on a judicial administration it could still compel and control the actions of these same trustees, to whom the trust was committed, on the theory that they were trustees of the powers after the properties had been given to the beneficiaries. This principle does not operate in Mississippi, and these trustees would be at liberty to refuse to function under the court or as judicial trustees.

The court below did not intend to confuse the capable handling of the estate at the hands of these petitioners, but did so in such a way that it will appear to practitioners of the Mississippi Bar that where a trust may not be terminated under local law, the same result may be accomplished by the difference in Federal and local procedure.

II.

The Circuit Court has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision. It has found facts and stated its conclusions without regard to the findings and conclusions of the District Court, except to note an apparent deficiency therein (R. p. 649). It found that the express terms and provisions of the trust agreement providing for equal protection under unity of action and control, as required by the Bondholders' Protective Agreement,

under the authority of which the trust was created, and pursuant to which protective covenants were made, afforded no protection to minority certificate holders. On this conclusion, it based its decision; since it says that if the trust agreement had related to the original bondholders, or if the protective agreement had related to the securities of the Trustee Corporation, the trial court might have been justified in dismissing the complaint (R. 649—last sentence). Realizing that the trust could not be dissolved without a reorganization of the Trustee Corporation, it remanded the action to the District Court with directions that in lieu of dissolution, the court take jurisdiction of such proceeding as might be required to preserve the Trustee Corporation (presumably an arrangement as in Bankruptcy reorganization), although no such relief had been prayed, its efficacy or appropriateness had not been asserted by the parties, and such jurisdiction had not been invoked. It authorized the court to deprive the individual petitioners herein of their powers as trustees to hold and exercise unity of control and management of the entire properties; the trust properties being then in a condition in which the equal protection of minority as well as majority interests required unity of control and management.

III.

The court below has failed to apply Rule 52 of the Rules of Civil Procedure in the way that it was intended, in the way it should be applied, or in any manner to make it effective.

IV.

The limits and extent of protection of minority interests by Protective Agreements and by the Federal Courts

should be clarified by a complete exposition of the rules governing the rights of the parties in this action. This record demonstrates a successful management and control of the properties prior to the institution of action by Respondents. All interests were equally protected and any holder desiring to liquidate his holdings was provided with a negotiable certificate for that purpose. These certificates showed a continuous rise in value from 1930 to 1939. While their value since the commencement of this action is not shown by the record, the court can not be blind to its effect.

V.

An important question of Federal law of procedure is presented on this record and should be decided by this court. The Circuit Court reversed the judgment of the District Court, and ordered the granting of the injunction prayed by respondents. However, it conditioned its action upon directions it gave for further proceedings, ranging from a continuation of the trust for a period shorter than the alloted ten years, to an immediate reorganization of the Trustee Corporation. None of this relief was prayed in respondents' complaint, unless it could have been granted under the general prayer. The power and jurisdiction of the court to take such action in a case where such relief was not in issue, was not contended for by the parties, and on a record developed upon an entirely different theory, without affording the parties an opportunity to be heard on the proposed action before it is made binding as the law of the case, raises a grave constitutional question which this court should set at rest.

PRAYER

For all of the reasons hereinabove set forth, and others on the face of the record herein which may be apparent to the court, Petitioners pray the grant of the Writ of Certiorari to review the action of the Circuit Court of Appeals for the Fifth Circuit, and that on a full and final hearing, the judgment of said court shall be reversed.

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